Supreme Court, U.S.
FILED
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CLERK

No. 99-859

IN THE

Supreme Court of the United States

Central Green Co.,

Petitioner,

v.

United States of America,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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DOCKET ENTRIES

5/21/96	1	COMPLAINT before Senior Judge Robert E. Coyle referred to Magistrate Judge Sandra M. Snyder Summons issued; fee status paid; Receipt # 171910; jury demand; Notice regarding Consent forms (dg) [Entry date 05/22/96]
5/21/96	2	ORDER setting scheduling conference for 9:00 7/25/96 before Magistrate Judge Sandra M. Snyder (cc: all counsel) (dg) [Entry date 05/22/96]
6/27/96	3	RETURN OF SERVICE executed upon defendant -Madera Irrigation on 6/14/96 (fg) [Entry date 07/01/96]
6/27/96	4	RETURN OF SERVICE executed upon defendant USA on 6/14/96 (fg) [Entry date 07/01/96]
7/2/96	5	FIRST AMENDED COMPLAINT [1-1] by plaintiff; jury demand (lm) [Entry date 07/05/96]
7/2/96	6	PROOF OF SERVICE by plaintiff of [1-1] (lm) [Entry date 07/05/96]
7/2/96	7	PROOF OF SERVICE by plaintiff of [1-1] summons and complaint (lm) [Entry date 07/05/96]
7/11/96	8	LETTER for Central Green Company scheduling conference continued from

		7/25/96 to 10:00 9/26/96 (cc: all counsel)(fg) [Entry date 07/16/96]
7/16/96	9	ANSWER by - Madera Irrigation; jury demand (rm) [Entry date 07/18/96]
8/6/96	10	ANSWER by defendant USA to pltf's first amended complaint (fg) [Entry date 08/07/96]
9/19/96	11	SCHEDULING CONFERENCE STATEMENT by plaintiff (rm) [Entry date 09/20/96]
9/26/96	12	MINUTES of 9/26/96 before Magistrate Judge Sandra M. Snyder scheduling conference held on 9/26/96 order to follow (rm) [Entry date 09/27/96]
9/27/96	13	SCHEDULING ORDER Magistrate Judge Sandra M. Snyder expert disclosure ddl 8/15/97; supplemental expert disclosure ddl 9/12/97 ; discovery ddl 11/7/97 non-dispositive motion ddl 11/24/97 ;dispositive motion ddl 12/15/97; pretrial conf 2:00 2/3/98 #4; Jury Trial 10:00 3/24/98 #1; (cc: all counsel) (rm) [Entry date 09/30/96]
10/10/96	14	LETTER to court from counsel for plaintiff Central Green Co notifying the court that Timothy Jones is counsel (pp) [Entry date 10/11/96]
5/29/97	15	LETTER to court from counsel for plaintiff regarding discovery documents (lm) [Entry date 06/03/97]

7/18/97	16	MOTION for judgment on the pleadings for lack of subject matter jursdiction by deft USA before Judge Coyle Hearing Set For 8/18/97 1:30 ctrm 1; points and authorities (hl) [Entry date 07/21/97]
7/21/97	18	NOTICE: from H Nazaroff motion for judgment on the pleadings for lack of subject matter jursdiction by deft before Judge Coyle [16-1] HEARING SET FOR 1:30 8/25/97 (hl) [Entry date 08/15/97] [Edit date 08/15/97]
8/11/97	17	RESPONSE/memorandum of points and authorities by pltf Central Green Co in opposition to motion for judgment on the pleadings for lack of subject matter jursdiction by deft USA [16-1] (hl) [Entry date 08/12/97]
8/18/97	19	REPLY by deft USA to response in opposition to motion for judgment on the pleadings for lack of subject matter jursdiction by deft USA [16-1] (hl) [Entry date 08/19/97]
8/25/97	20	MINUTES of 8/25/97 before Senior Judge Coyle motion for judgment on the pleadings for lack of subject matter jursdiction by deft USA [16-1] SUBMITTED C/R P Smith (hl)[Entry date 08/26/97]
9/18/97	21	ORDER by Senior Judge Robert E. Coyle ORDERING motion for judgment on the pleadings for lack of subject matter jursdiction by deft USA before

		Judge Coyle [16-1] GRANTED dismissing party USA for lack of subject matter jurisdiction (cc: all counsel) (jv) [Entry date 09/24/97)
9/24/97	--	LODGED substitution of attorneys by plaintiff Central Green Co (lh) [Entry date 09/25/97]
9/25/97	22	ORDER by Magistrate Judge Sandra M. Snyder ORDERING Timothy Jones to be substituted as attorney of record (cc: all counsel) (lh) [Entry date 09/26/97]
10/10/97	--	LODGED proposed order granting plaintiff's motion for entry of final judgment by plaintiff Central Green Co (lh) [Entry date 10/14/97]
10/10/97	23	NOTICE OF MOTION AND MOTION for entry of final judgment by plaintiff Central Green Co Motion Hearing Set for 11/17/97 at 1:30 pm (lh) [Entry date 10/14/97]
10/10/97	24	MEMORANDUM by plaintiff Central Green Co in support of motion for entry of final judgment (1h) [Entry date 10/14/97]
10/30/97	25	RESPONSE by defendant USA to motion for entry of final judgment by plaintiff Central Green Co [23-1] (cc) [Entry date 10/31/97]
11/10/97	26	MEMORANDUM by plaintiff Central Green Co in support of motion to certify

		order granting motion to dismiss and request for stay [23-1] (jv) [Entry date 11/13/97]
11/14/97	--	LODGED stipulation to have judgment entered and staying remaining issues pending appeal by plaintiff Central Green Co (ls) [Entry date 11/17/97]
11/17/97	27	MINUTES of 11/17/97 before Senior Judge Robert E. Coyle motion for entry of final judgment by plaintiff Central Green Co [23-1] GRANTED C/R C. Pickens (ls) [Entry date 11/18/97]
11/18/97	28	ORDER by Senior Judge Robert E. Coyle ORDERING party USA DISMISSED;, Case STAYED until the 9th Circuit rules on the Dismissal Order (cc: all counsel) (ls) [Entry date 11/19/97]
11/20/97	29	JUDGMENT; it is ordered that the United States is DISMISSED from this case (cc: all counsel) (ls)
12/3/97	30	NOTICE OF APPEAL by plaintiff Central Green Co from District Court decision, (fee status paid) (jv) [Entry date 12/04/97]
12/3/97	31	RECEIPT of $105/ Appeal Fee for pltf Central Green Co by Wilkins, Jones Drolshagen Receipt # 175683 (jv) [Entry date 12/04/97]

12/4/97	32	MAILED case information/docket fee payment notice copy of Notice of Appeal and appealed 11/20/97 judgment to 9th Circuit Court of Appeals copy of appeal and certified copy of docket sheet to all parties (jv)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CENTRAL GREEN COMPANY, a California Limited Partnership, Plaintiff, vs. UNITED STATES OF AMERICA; MADERA IRRIGATION DISTRICT, Defendants.	CASE NO. CV-F-965541 REC SMS FIRST AMENDED COMPLAINT FOR DAMAGES FOR INVERSE CONDEMNATION; NUISANCE; TRESSPASS; AND NEGLIGENCE DEMAND FOR JURY TRIAL

Plaintiff CENTRAL GREEN COMPANY alleges as follows:

JURISIDICTION AND VENUE

1. CENTRAL is a Limited Partnership duly authorized and existing by virtue of the laws of the State of California and doing business in Madera County, California ("Plaintiff" or "CENTRAL").

2. Defendant the UNITED STATES of AMERICA is, and at all times mentioned herein was, a governmental organization authorized and existing by virtue of the laws of

the United States of America. The Department of the Interior of the United States of America operates the Bureau of Reclamation which, among other things, owns certain canals in Madera County used for delivery of irrigation water to farmers ("UNITED STATES")

3. Defendant the MADERA IRRIGATION DISTRICT ("DISTRICT") is, and at all times herein mentioned was, a public entity organized and existing under the laws of the State of California.

4. Venue is appropriate in this Court since all of the real property at issue in this action is located in Madera County, California and the torts alleged herein occurred in Madera County, California. Jurisdiction in this Court is based on 28 U.S.C. § 1346(b) as to the UNITED STATES and the pendant jurisdiction of this Court as to the DISTRICT

BACKGROUND ALLEGATIONS

5. At the time of Defendants' acts complained of herein, Plaintiff was the owner of the real property described in Exhibit "A" attached hereto and incorporated herein.

6. The real property described in Exhibit "A" consists of approximately 1000 acres. During the time that Plaintiff has owned this property, it has continually used it for the production of pistachios.

7. Plaintiff is informed and believes and thereon alleges that defendant UNITED STATES planned, designed, constructed, and/or maintains the Madera Canal which is used to convey irrigation water to various lands in the San Joaquin Valley and which runs through Plaintiff's property as shown in Exhibit "A".

8. Plaintiff is informed and believes and based thereon alleges that DISTRICT is under contract to the UNITED STATES whereby it has the right to use, and the obligation to maintain, the Madera Canal. A true and correct copy of the contract between the UNITED STATES and DISTRICT is attached hereto as Exhibit "B".

9. The Madera Canal was constructed or has been maintained in such a fashion that substantial amounts of water leak and have leaked from Defendants' canal causing substantial subsurface flooding of portions of Plaintiff's property. This subsurface flooding created an extremely shallow water table condition resulting in irreparable damage to portions of Plaintiff's pistachio orchard, as well as increased farming and harvesting costs.

10. Plaintiff has been told by Defendants that the water seepage/leakage problem would be taken care of and remedied. Based on these representations, Plaintiff has foregone legal action until the present time. Furthermore, Plaintiff is informed and believes and thereon alleges that no remedial work or efforts to thwart the leakage from the Madera Canal have been undertaken by Defendants.

11. On or about June 10, 1995 Plaintiff served its claim for damages in an amount in excess of $25,000 on Defendant DISTRICT in accordance with the law of the State of California and DISTRICT'S procedures. A true and correct copy of the claim served is attached hereto as Exhibit "C" and incorporated herein.

12. On or about June 29, 1995 Defendant DISTRICT rejected Plaintiff's claim. A true and correct copy of DISTRICT'S Notice of Rejection is attached hereto as Exhibit "D" and incorporated herein.

13. On or about July 27, 1995 Plaintiff served its claim for damages in an amount approximating $125,000.00 on the UNITED STATES through the Department of the Interior in accordance with the laws of the United States and Department of the Interior's procedures. A true and correct copy of the claim served is attached hereto as Exhibit "E".

14. On or about December 11, 1995 Defendant UNITED STATES through the Bureau of the Interior rejected Plaintiff's claim. A true and correct copy of the UNITED STATES' Notice of Rejection is attached hereto as Exhibit "F" and incorporated herein.

15. Plaintiff has received no compensation for the damage to its property.

FIRST CLAIM
(Inverse Condemnation - All Defendants)

16. Plaintiff incorporates by referenced each and every allegation contained in paragraphs 1 through 15 above as though fully set forth herein.

17. As a direct and necessary result of Defendants' negligent design, maintenance, and operation of the canal, Plaintiff's property was and is being flooded and severe property damage has been the result.

18. This damage was caused by Defendants' failure to design and/or maintain the canal so that it would not leak onto or under the land of adjacent property owners such as Plaintiff.

19. As a result of the flooding of its real property, Plaintiff has been damaged in an amount in excess of $125,000.00 including but not limited to damage for loss of trees on the property, decreased and lost production, replanting costs, increased farming and harvesting costs, and other damages to the property associated with the leakage.

20. In addition, Plaintiff has incurred and will continue to incur attorneys' fees, appraisal fees, and engineering fees because of this proceeding, in amounts that cannot yet be ascertained but which are recoverable in this action under the provisions of Section 1036 of the California Code of Civil Procedure.

SECOND CLAIM
(Continuing Nuisance - All Defendants)

21. Plaintiff incorporates by reference each and every allegation contained in paragraphs 1 through 20 above as though fully set forth herein.

22. At all times mentioned herein, Defendants have operated and maintained its canal in a manner which has allowed water to leak from the canal and flood Plaintiff's property.

23. The aforementioned operation and maintenance of the canal by Defendants which allows water to leak onto Plaintiff's property constitutes a continuing nuisance within the meaning of California Civil Code Section 3479 in that it interferes with Plaintiff's use and enjoyment of the property.

24. Defendants, and each of them, have refused to abate the nuisance and will continue to refuse to do so unless restrained by this Court, will continue to maintain the nuisance and continue the acts complained of and each and every act has been and will be without the consent, against the will, and in violation of the rights of Plaintiff.

25. Unless Defendants are restrained by order of this Court, it will be necessary for Plaintiff to commence many successive actions against Defendants to seek compensation for damages sustained thus requiring a multiplicity of suits and Plaintiff will be threatened with flooding of its property each time the Madera Canal has water in it.

26. Unless Defendants are enjoined from continuing their course of conduct, Plaintiff will suffer irreparable injury as alleged above.

27. Plaintiff has no plain, speedy, or adequate remedy at law.

28. As a proximate result of the nuisance created by Defendants', Plaintiff has been, and will be, damaged in a sum in excess of $125,000.00 resulting from the loss of trees, reduced and lost production, replanting costs, lost business, increased farming and harvesting costs, diminution in value of Plaintiff's property and other repairs to put Plaintiff's property in the condition it was in prior to the damage caused by Defendants.

THIRD CLAIM
(Continuing Tresspass - All Defendants)

29. Plaintiff incorporates by reference each and every allegation contained in paragraphs 1 through 28 above as though fully set for the herein.

30. Defendants have at various time and continuing to the present, without Plaintiff's consent, caused water to be released from the Madera Canal and onto Plaintiff's land through their maintenance and operation of said canal. Said actions constitute a continuing trespass.

31. As a proximate result of the Madera Canal releasing water onto Plaintiff's property, Plaintiff's pistachio orchard was damaged to such an extent that Plaintiff suffered decreased production, the destruction of parts of the pistachio orchard thereby diminishing its value, replanting costs, increased farming and harvesting costs, and other repairs entitling Plaintiff to injunctive relief as alleged above and damages in a sum in excess of $125,000.00.

FOURTH CLAIM
(Dangerous Condition of Real Property - All Defendants)

32. Plaintiff incorporates by reference each and every allegation contained in paragraphs 1 through 31 above as though fully set forth herein.

33. Defendants, acting through their agents and employees, negligently and carelessly operated and maintained the Madera Canal so as to allow water to escape from the canal, causing subsurface flooding of Plaintiff's property. Such negligence caused a dangerous condition that created a substantial risk of the type of damage suffered by Plaintiff.

34. As a proximate result of the negligent conduct of Defendants and the dangerous conditions created thereby, water seeped onto Plaintiff's property causing subsurface and surface flooding, irreparable damage to Plaintiff's trees, diminution in value of Plaintiffs property, decreased production of Plaintiff's trees, replanting costs, increased farming and harvesting costs and other expenditures that Plaintiff has expended in an attempt to restore Plaintiff's property to the condition it was in prior to

the flooding. As a result of such injuries to Plaintiff's property, Plaintiff has and will suffer damages in a sum in excess of $125,000.00.

WHEREFORE, Plaintiff prays for judgment as follows:

On the First Claim

1. For damages in excess of $125,000.00 with interest thereon at the legal rate from the date of those damages;

2. For reasonable attorneys, appraisal, and engineering fees according to proof pursuant to C.C.P. Section 1036.

On the Second Claim

3. For general and specific damages in an amount in excess of $125,000.00 according to proof at trial and including but not limited to, the reasonable costs of replacing the trees destroyed, the loss of use of the affected parts of the orchard, production losses, increased farming and harvesting costs, diminution in value of Plaintiff's property, and other consequential damages arising from Plaintiff's attempts to restore the property to its prior condition.

4. An injunction ordering Defendants to repair the Madera Canal and prevent the release of water onto Plaintiff's property.

On the Third Claim

5. For general and specific damages in an amount in excess of $125,000.00 according to proof at trial and including but not limited to, the reasonable costs of replacing the trees destroyed, the loss of use of the affected parts of the orchard, production losses, increased farming and harvesting costs, diminution in value of Plaintiff's property, and other consequential damages arising from Plaintiff's attempts to restore the property to its prior condition.

6. An injunction ordering Defendants to repair the Madera Canal and prevent the release of water onto Plaintiff's property.

On the Fourth Claim

7. For general and specific damages in an amount in excess of $125,000.00 according to proof at trial and including but not limited to, the reasonable costs of replacing the trees destroyed, the loss of use of the affected parts of the orchard, production losses, increased farming and harvesting costs, diminution in value of Plaintiff's property, and other consequential damages arising from Plaintiff's attempts to restore the property to its prior condition.

On All Claims

8. For interest on all damages at the legal rate according to proof;

9. For reasonable attorneys' fees according to proof;

10. For all costs of suit reasonably incurred herein; and

11. For such other and further relief as the court may deem proper.

Dated: July 1, 1996

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP

By: /s/
TIMOTHY JONES
Attorneys for CENTRAL GREEN COMPANY

DEMAND FOR JURY

CENTRAL GREEN COMPANY hereby demands a trial by jury on all issues triable thereby.

DATED: July 1, 1996

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP

By: /s/
TIMOTHY JONES

EXHIBIT A

The real property which is the subject of this action is located in Madera County, California and more particularly described as: "that portion of parcel #5 described as Government Lot 8 and the S. ½ of Government Lots 9 and 10 in Sec. 6 T11S and R. 21E together with the S. ½ of the S. ½ of Sec. 1 T11S. R. 20E Recorded as Parcel #1 in Book 1206 Page 617 Madera County Records."

EXHIBIT "A"

EXHIBIT B

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

COOPERATIVE AGREEMENT AMONG THE UNITED STATES OF AMERICA, THE MADERA IRRIGATION DISTRICT, AND THE CHOWCHILLA WATER DISTRICT PROVIDING FOR OPERATION AND MAINTENANCE OF MADERA CANAL AND ASSOCIATED PROJECT WORKS

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

COOPERATIVE AGREEMENT AMONG THE UNITED STATES OF AMERICA,
THE MADERA IRRIGATION DISTRICT, AND THE CHOWCHILLA WATER DISTRICT
PROVIDING FOR OPERATION AND MAINTENANCE OF MADERA CANAL AND
ASSOCIATED PROJECT WORKS

THIS COOPERATIVE AGREEMENT made this 20th day of September 1985, pursuant to the Act of June 17, 1902 (32 Stat. 388), Section 5 of the Act of August 13, 1914 (38 Stat. 687), and acts amendatory thereof or supplementary thereto, all collectively hereinafter referred to as the Federal reclamation laws, among the UNITED STATES OF AMERICA, herein after referred to as the United States, the MADERA IRRIGATION DISTRICT, and the CHOWCHILLA WATER DISTRICT, hereinafter referred to as the Districts, public agencies of the State of California, duly organized, existing, and acting pursuant to the laws thereof, with their principal places of business in Madera and Chowchilla, California, respectively.

WITNESSETH THAT:

EXPLANATORY RECITALS

WHEREAS, the United States has constructed the Friant Division, Central Valley Project, including Friant Dam and Millerton Lake, Madera Canal, the Friant-Kern Canal, and operating headquarters for storage, diversion, carriage and distribution of the waters of the San Joaquin River for agricultural, municipal, industrial, domestic, and other purposes; and

WHEREAS, it is deemed to be in the best interest of the United States for the Districts to assume the care, operation, and maintenance of the Madera Canal; and

WHEREAS, the Districts, are willing to assume the care, operation, and maintenance of these works pursuant to the terms and conditions herein;

NOW THEREFORE, in consideration of the covenants herein contained, it is hereby mutually agreed as follows:

DEFINITIONS

1. When used herein, unless otherwise distinctly expressed, or manifestly incompatible with the intent hereof, the term:

(a) "Secretary" or "Regional Grants and Cooperative Agreements Officer" hereinafter referred to as RGCAO shall mean the Secretary of the Interior or his duly authorized representative;

(b) "Project works" shall mean the Madera Canal, in-line control facilities, turnouts, measuring devices, Madera Canal Equalizing Reservoir, associated water level control devices and water level recording instruments, and other appurtenant structures as described in the Performance Work Statement (PWS) including related O&M documents, which is incorporated herein by reference;

(c) "Year" shall mean the period from and including the first day of October of each calendar year through the last day of September of the following calendar year;

(d) "Initial year" shall mean that year, or any part thereof, in which the Districts initially assume the care, operation, and maintenance of the Project works;

(e) "Quarter" shall mean each 3-month period beginning with the first day of October, January, April, or July; and

(f) "O&M" shall mean the care, operation, and maintenance of Project works.

TERM OF AGREEMENT

2. This agreement shall become effective on the date of execution and shall remain in effect until February 28, 1992, unless terminated as follows:

(a) Termination for cause.--The RGCAO may terminate this Agreement in whole, or in part, at any time before the date of completion, whenever it is determined that the Districts have failed to comply with the conditions specified herein. The RGCAO shall promptly notify the Districts in writing of the determination and the reasons for the termination, together with the effective date, which in no event will be less than 90 days from the date of notice. Payments made to the Districts or recoveries by the RGCAO should this Agreement be terminated for cause shall be in accord with the legal rights and liabilities of the parties.

(b) Termination for convenience. --The RGCAO or both Districts acting together may terminate this agreement in whole, or in part, when all parties agree that the continuation of the agreement would not produce beneficial results commensurate with the further expenditure of funds. The parties shall agree upon the termination conditions, including the effective date and, in the case of partial terminations, the portion to be terminated. The Districts shall not incur new obligations for the terminated portion after the effective date, and shall cancel as many outstanding obligations as possible. The RGCAO shall allow full credit to the Districts for the Federal share of the noncancellable obligations, properly incurred by the Districts prior to termination.

(c) Termination by one District.--If, at any time, one District desires to terminate their participation in this Agreement, said District shall provide 90 days written notice to both the RGCAO and the other District of such intent. Upon receipt of such notice, the RGCAO will determine if it is in the best interest of the United States for the remaining District to assume all of the obligations under this Agreement. If the RGCAO determines such assumption of obligations is in the

best interest of the United States, and said District wishes to assume said obligations, said District hereby agrees to said assumption. If the RGCAO determines such assumption is not in the best interest of the United States, or the remaining District opts not to assume the obligations of this Agreement, this Agreement will be terminated as provided in (b) above.

DISTRICT TO ASSUME RESPONSIBILITY FOR CARE, OPERATION, AND MAINTENANCE OF MADERA CANAL AND ASSOCIATED PROJECT WORKS

3. (a) Prior to the O&M of Project works by the Districts, the parties will conduct a joint inspection of the Project works. Subsequent to the inspection, the RGCAO will furnish the Districts a written notice, specifying the schedule on which O&M activities will be performed by the Districts, describing any deficiencies observed by either party during the joint inspection, and describing the actions to be taken to correct such deficiencies. The Districts will accept the responsibility for O&M of the Project works on October 1, 1985, and thereafter O&M said works in accordance with this Agreement and the PWS and attached OMB circulars A-102, as amended (Uniform Administrative Requirements for grants-in-aid to State and local Governments), A-128 (Implementing the Single Audit Act) and A-87, as amended (Cost Principles for State and local Governments).

(b) The Districts shall make no substantial change in the Project works without first obtaining the written consent of the RGCAO. The RGCAO's determination as to whether any change in any such works is or is not substantial shall be conclusive and binding upon the parties hereto. The Districts shall make promptly any and all repair to the Project works which, in the opinion of the RCCAO, are deemed necessary for the proper O&M of the same. In the event that the Districts neglect, fail, or are unable to make such repairs within a reasonable period of time, the United States may, upon giving

30 days' written notice to the Districts, cause the repairs to be made.

(c) The Districts shall O&M the Project works in the manner necessary to keep them in good condition and to satisfy all valid obligations of the United States pertaining to the diversion, carriage, and distribution of water in and from said works.

(d) The Districts shall O&M the Project works in accordance with the PWS and such documents shall be maintained in current status at a location designated by the Districts.

(e) All contracts or subagreements for construction or repair of Project works shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 USC 874) as implemented in Department of Labor Regulations (29CFR, Part 3).

TERMINATION OF AGREEMENT NO. 3-FC-20-00240

4. Madera Irrigation District hereby waives the 90-day termination notice for Agreement No. 3-FC-20-00240, entitled "Cooperative Agreement Between the United States of America and the Madera Irrigation District Providing for Operation of Madera Canal and Certain Additional Project Works." Said agreement will be terminated on September 30, 1985.

UNITED STATES TO BE HELD HARMLESS

5. The Districts hereby agree to indemnify and hold harmless the United States, its agents and employees, from any loss or damage and from any liability on account of personal injury, death, or property damage of any nature whatsoever and by whomsoever made arising out of the Districts' failure to properly perform their activities under this agreement. The Districts do not assume any liability to or agree to hold harmless the United States or any other person or persons for

damages or injuries caused by (1) faulty design or construction of the Project works, (2) faulty or insufficient maintenance or inspections prior to the transfer of said works to the District or (3) performance by the Districts of specific operations or procedures directed or approved by the RGCAO provided said operations or procedures are performed by the Districts in a customary or reasonable fashion.

DISTRICTS TO RELINQUISH RESPONSIBILITY FOR OPERATION AND MAINTENANCE OF THE MADERA CANAL AND ASSOCIATED PROJECT WORKS

6. The RGCAO shall at all times have access to the Project works and may inspect and investigate the same for the purpose of ascertaining if they are being kept in safe and proper operating condition. If at any time, the RGCAO determines that the Districts have not operated and maintained said works in accordance with the provisions of this Agreement, the RGCAO may, upon giving 90 days' written notice to the District suspend the Agreement and reassume the O&M of all or part of the Project works including all equipment owned by the United States which is then being used by the Districts to O&M the Project works, and equipment purchased by the Districts with funds obtained pursuant to this Agreement: Provided, That if in the opinion of the RGCAO, an emergency or other condition exists which would cause undue harm or damage to persons or property if not remedied immediately, such 90-day notice need not be given, and the Districts hereby agree to surrender O&M of the Project works, or any part thereof to the RGCAO, immediately upon notification of such emergency. Any taking back of responsibility for the O&M of said Project works by the United States shall not relieve the Districts of any of their obligations under this Agreement other than the obligation to O&M said works during the period the United States is doing so. The RGCAO may return the O&M responsibility of the Project works back to the District upon 90 days' written notice to the Districts.

SUBMITTAL OF PROPOSED BUDGETS

7. (a) Madera Irrigation District, no later than June 1 each year, shall submit on behalf of both Districts to the RGCAO, in such detail as he may require, a proposed program and budget, for the O&M of the Project works for the subsequent year and a preliminary budget for the two succeeding years. The budgets shall include all estimated O&M costs (normal maintenance, replacement, additions and extraordinary maintenance), administrative overhead, costs of liability insurance, participation in a self insurance or pooling agreement, including estimated retention of claims and legal expense, and other costs similar to those that would normally be incurred by the United States and which will be incurred by the Districts under this Agreement. Subject to the terms of this Agreement and provisions of Federal Acquisition Regulations (FAR), Subpart 31.6, all indirect and overhead costs charged against this agreement shall be apportioned in the same manner as the Districts apportion similar costs annually incurred in the Districts' operations, and as limited by Article 8.(a). The Madera Irrigation District shall notify the RGCAO as provided in Article 26 with respect to all estimated costs in excess of the estimated budget.

(b) The RGCAO shall, prior to July 1 each year, give written notice of approval of the budget for the succeeding year. If such written notice is not given by that date, the Agreement will terminate October 1 of that year.

(c) Notwithstanding the provisions of Part (a) of this article, the proposed program for O&M of the Project works may, with the written approval of the RGCAO, be revised during any year to meet unforseen contingencies. Provided, That in the event of an emergency, Madera Irrigation District may request and receive oral consent of the RGCAO for expenditure of funds to alleviate the emergency, which oral consent shall be confirmed in writing by the RGCAO within five working days. If the expenditure of funds for emergency purposes cause the total budget to be exceeded, Madera

Irrigation District shall submit on behalf of both Districts a revised budget within 30 days of the request for emergency expenditure authority for approval in accordance with Article 26.

INVOICES AND PAYMENTS (ALLOWABLE COSTS)

8. (a) For the purposes of this Article, the term "costs" shall include those recorded costs which result, at the time of the request for reimbursement, for necessary and reasonable direct and indirect costs incurred, but not necessarily paid, for the operation and maintenance of the Project under terms of this Agreement. Direct costs shall include labor and related fringe benefits, materials and supplies, travel, equipment depreciation, items or services purchased directly for operating and maintaining the Project works, and other related costs. Indirect costs charged to the Agreement shall be those normal and necessary administrative and general costs of operations that are equitably allocated to performing obligations under this Agreement. The allowability of all costs under this Agreement, including the basis for allocating indirect costs, shall be subject to cost allowability guidelines provided in FAR Subpart 31.6, and shall be subject to Bureau verification, as provided under Article 9, hereunder.

(b) For O&M of the Project works, the United States will pay to the Madera Irrigation District on behalf of both Districts, the allowable costs either through advance payments or by reimbursement of allowable costs incurred.

(1) Cash advances will be made in accordance with the requirements set forth in current Treasury and Departmental regulations and/or subsequent changes as they may occur. If the advance payments method is used, the amount of such payments will be the estimated costs as specified in the approved budget, less any balance of funds available from prior advances. Such payments shall not be made more frequently than monthly in amounts approved by

the RGCAO. The Districts shall submit to the RGCAO a statement of costs incurred during the month by the 25th of the following month. The Districts' monthly statement shall provide both monthly and fiscal year-to-date cost data.

(2) If the reimbursement method is used, Madera Irrigation District shall submit, on behalf of both Districts in such form and reasonable detail as the RGCAO may require, monthly invoices supported by a statement of costs for allowable costs incurred during the previous month. In recognition of the Districts' need for sufficient funds to meet cash flow requirements of the Operation and Maintenance activity, payment will be promptly processed after receipt of each invoice. The Districts will normally receive payment within 15 days after receipt of the invoices by the RGCAO.

(c) By October 31 of each year, Madera Irrigation District shall submit on behalf of both Districts a voucher for all allowable costs for the year which ended the preceding September 30 which were not previously paid. This final voucher for each year will be accompanied by a statement detailing the total incurred costs for the entire year which ended the preceding September 30. This statement will be in such format and provide such detail as the RGCAO requires.

(d) Any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by either District for activities performed under this Agreement shall be paid or credited by said District to the United States to the extent that they are properly allocable to costs for which the Districts have been reimbursed by the United States under this Agreement. Reasonable expenses incurred by the Districts for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable costs hereunder when approved by the RGCAO. Prior to final payment under this Agreement, the Districts shall execute and deliver:

(1) An assignment to the United States, in form and substance satisfactory to the RGCAO, of future refunds, rebates, credits, or other amounts (including any interest

thereon) properly allocable to costs for which the Districts have been reimbursed by the Government under this Agreement; and

(2) A release discharging the United States, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under operation and maintenance performed pursuant to this Agreement subject only to the following exceptions:

(a) Specified claims in stated amounts or in estimated amounts where the amounts cannot, at the time, be determined exactly by the Districts; and

(b) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the Districts to third parties arising out of the performance of this Agreement. Provided, however, That such claims have not been received by the Districts by the date of the execution of the release; and provided further, that the Districts give notice of such claims in writing to the RGCAO not more than 6 years after the date of the release or the date of any notice to the Districts that the United States is prepared to make final payment, whichever is earlier.

(e) All funds advanced by the United States pursuant to Section (b)(1) of this article shall immediately be deposited by the Madera Irrigation District in a special account in a bank that is a member of the Federal Reserve System, or, if approved by RGCAO, in any fiduciary account in a manner provided by the laws of the State of California, and such account shall be maintained until all funds so advanced shall have been expended or returned to the United States. Interest credited on funds advanced shall be considered as advances by the United States.

BOOKS, RECORDS, AND REPORTS

9. The Districts shall establish and maintain accounts and other books and records pertaining to its financial transactions, O&M of the Project works, and to other matters relating to this Agreement as the RGCAO may require. Reports

shall be furnished to the RGCAO in such form as he may require within thirty (30) days after the end of the year. Subject to applicable Federal laws and regulations, each party shall have the right during office hours to examine and make copies of each other's books and official records relating to matters covered by this Agreement.

TITLE TO REMAIN WITH THE UNITED STATES

10. Title to all Project works shall remain with the United States until otherwise provided by the Congress.

RIGHT OF FIRST REFUSAL BY FEDERAL EMPLOYEES

11. Within the first 6 months from the effective date of this Agreement, the Districts shall give Federal employees adversely affected or separated from employment by the United States, as a result of this Agreement, the right of first refusal for employment by the Districts in positions for which they are qualified, in conformance with the respective Districts' personnel policies in effect at that time.

AUTHORIZATION OF LAND USES ON REAL PROPERTY OF THE UNITED STATES

12. (a) For the purposes of the Agreement, the following terms are defined as follows:

(1) An "outgrant" is a term used to collectively identify all instruments such as easements, licenses, permits, leases, memorandum of understanding, etc., issued to third parties by the United States authorizing the use of lands under its jurisdiction.

(2) "Right of use" includes easements, leases, licenses and permits issued to allow the occupying, using or traversing of lands under the jurisdiction of the United States and issued under authority granted for that purpose (synonymous with outgrant).

(3) "Right of use fee" means the fair market value of the rights, privileges and interests granted by the United States for the use of the land as determined by a qualified appraiser using approved appraisal methods (43 CFR 429).

(b) In granting a third-party right of use of the canal rights of way, the United States shall exercise care to assure that:

(1) The request is compatible with O&M on the canal rights of way;

(2) The encroachment is held to the minimum area practical;

(3) There is no interference with water supply operations on the right of way; and

(4) The outgrants issued conveys no more interest in or privilege to use the land than is required.

(c) Third parties to outgrants shall be charged a right-of-use fee. All right of use fees collected for outgrants shall be deposited to the Reclamation Fund.

(d) When the Districts receive a request (application) from a third party for an outgrant it shall be handled in accordance with Section 5.7 of the PWS.

(e) When the Districts find it necessary to construct facilities on lands under the jurisdiction of the United States for O&M of the Project works, the Districts shall not construct such facilities unless and until:

(1) The Districts notify the RGCAO of its plans, setting forth in detail the location, manner and extent of the proposed use; and

(2) The RGCAO, upon finding the proposed use to be reasonable and consistent with this Agreement and in accordance with good engineering practices, shall issue, without cost to the Districts, an appropriately written outgrant for such use.

RULES, REGULATIONS, AND DETERMINATIONS

13. (a) The RGCAO shall have the right to make rules and regulations governing the O&M of Project Works consistent with the laws of the United States and to add to or to modify them as may be deemed proper. The Districts hereby agree to observe all such rules and regulations unless they are inconsistent with the express terms of this Agreement.

(b) Where the terms of this Agreement provide for action to be based upon the opinion or determination of any party to this Agreement, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations.

NOTICES

14. Any notice, demand, or request authorized or required by this Agreement shall be deemed to have been given, on behalf of the Districts, when mailed, postage prepaid, or delivered to the Regional Director, Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825, and on behalf of the United States, when mailed, postage prepaid, or delivered to the Madera Irrigation District, 12152 Road 28-1/4, Madera, California 93637. The designation of the addressee or the address may be changed by notice given in the same manner as provided in this article for other notices.

ASSIGNMENT LIMITED--SUCCESSORS AND ASSIGNS OBLIGATED

15. The provisions of this Agreement shall apply to and bind the successors and assigns of the parties hereto, but no assignment or transfer of this Agreement or any part or interest therein shall be valid until approved by the RGCAO, and such approval shall not be unreasonably withheld.

EQUAL OPPORTUNITY

16. The following clause is applicable for any subcontract the Districts may enter into which is in excess of $10,000. During the performance of this Agreement, the Districts will include the following requirement in such subcontracts:

(a) The subcontractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The subcontractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The subcontractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the RGCAO setting forth the provisions of this nondiscrimination clause.

(b) The subcontractor will, in all solicitations or advertisements for employees placed by or on behalf of the subcontractor, state that all qualified applicants will receive consideration for employment without discrimination because of race, color, religion, sex, or national origin.

(c) The subcontractor will send to each representative of workers, with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the RGCAO, advising the said workers' representative of the subcontractor's commitments under Section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The subcontractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The subcontractor will furnish all information and reports required by said amended Executive Order and by

the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the RGCAO and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the subcontractor's noncompliance with the nondiscrimination clauses of this subcontract or with any of the said rules, regulations, or orders, this subcontract may be canceled, terminated, or suspended, in whole or in part, and the subcontractor may be declared ineligible for further Government contracts in accordance with procedures authorized in said amended Executive Order, and such other sanctions may be imposed and remedies invoked as provided in said Executive Order, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Districts will include the provisions of paragraphs (a) through (f) in every subagreement, subcontract or purchase order unless exempted by the rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of said amended Executive Order, so that such provisions will be binding upon each subcontractor or vendor. The Districts will take such action with respect to any subagreement, subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, That in the event the Districts become involved in or is threatened with litigation, with a subcontractor or vendor as a result of such direction, the Districts may request the United States to enter into such litigation to protect the interests of the United States.

Note: Equal Employment Opportunity provisions are directed by Executive Order No. 11246 of September 24, 1965, (3 CFR page 167, 1965 Supplement), as amended by Executive Order No. 11375 or October 13, 1967, (3 CFR page 320, 1967 Compilation) and Executive Order No. 12086 of October 5, 1978.

TITLE VI, CIVIL RIGHTS ACT OF 1964

17. (a) The Districts agree that they will comply with Title VI of the Civil Rights Act of July 2, 1964 (78 Stat. 241) and all requirements imposed by or pursuant to the Department of the Interior Regulation 843 CFR 17) issued pursuant to that title, to the end that, in accordance with Title VI of that Act and the Regulation, no person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Districts receive financial assistance from the United States and hereby gives assurance that it will immediately take any measures to effectuate this Agreement.

(b) If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Districts by the United States, this assurance obligates the Districts, or in the case of any transfer of such property, any transferee for the period during which the real property or structure is used for a purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance obligates the Districts for the period during which they retain ownership or possession of the property. In all other cases, this assurance obligates the Districts for the period during which the Federal financial assistance is extended to them by the United States.

(c) This assurance is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts, or other Federal financial assistance extended after the date hereof to the Districts by the United States, including installment payments after such date on account of arrangements for Federal financial assistance which were approved before such date. The Districts recognize and agree that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall reserve the right to seek judicial enforcement of this assurance. This

assurance is binding on the Districts, their successors, transferees, and assignees.

CERTIFICATION OF NONSEGREGATED FACILITIES

18. The Districts hereby certify that they do not maintain or provide for their employees any segregated facilities at any of their establishments, and that they do not permit their employees to perform their services at any location, under their control, where segregated facilities are maintained. They certify further that they will not maintain or provide for their employees any segregated facilities at any of their establishments, and that they will not permit their employees to perform their services at any location, under their control, where segregated facilities are maintained. The Districts agree that a breach of this certification is a violation of the Equal Opportunity clause in this Agreement. As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, restrooms, and washrooms, restaurants and other eating areas, time clocks, locker rooms and other, storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, creed, color, or national origin, because of habit, local custom or otherwise. The Districts further agree that (except where they have obtained identical certifications from proposed subcontractors for specific time periods) they will obtain identical certifications from proposed subcontractors prior to the award of subcontracts exceeding $10,000 which are not exempt from the provisions of the Equal Opportunity clause; that they will retain such certifications in their files; and that (except where the proposed subcontractors have submitted identical certifications for specific time periods) the Districts will forward the following notice to such proposed subcontractors:

NOTICE TO PROSPECTIVE SUBCONTRACTORS OF REQUIREMENT FOR CERTIFICATIONS OF NONSEGREGATED FACILITIES

A Certification of Nonsegregated Facilities must be Submitted prior to the award of a subcontract exceeding $10,000 which is not exempt from the provisions of the Equal Opportunity clause. The certification may be submitted either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually, or annually). Note: The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT -- OVERTIME COMPENSATION

19. The Districts shall include the following provisions in all subcontracts related to this Agreement that are in excess of $2,000 for construction contracts or in excess of $2,500 for other contracts involving the employment of mechanics or laborers:

(a) Overtime requirements. - No contractor or subcontractor contracting for any part of the work pursuant to this Agreement which may require or involve the employment of laborers, mechanics, apprentices, trainees, watchmen, and guards, shall require or permit any laborer, mechanic, apprentice, trainee, watchman, or guard in any workweek in which he is employed on such work to work in excess of 8 hours in any calendar day or in excess of 40 hours in such workweek on work subject to the provisions of the Contract Work Hours and Safety Standards Act unless such laborer, mechanic, apprentice, trainee, watchman, or guard receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours worked in excess of 8 hours in any calendar day or in excess of 40 hours in such workweek, whichever is the greater number of overtime hours.

(b) Violation; liability for unpaid wages; liquidated

damages. - In the event of any violation of the provisions of paragraph (a), the Districts and any subcontractor responsible therefor shall be liable to any affected employee for his unpaid wages. In addition, such Districts and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer, mechanic, apprentice, trainee, watchman, or guard employed in violation of the provisions of paragraph (a) in the sum of $10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of 8 hours or in excess of his standard workweek of 40 hours without payment of the overtime wages required by paragraph (a).

(c) Withholding for unpaid wages and liquidated damages. - The RGCAO may withhold from the Districts, from any moneys payable on account of work performed by the Districts or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of the Districts or such subcontractor for unpaid wages and liquidated damages as provided in the provisions of paragraph (b).

(d) Subagreements or subcontracts. - The Districts shall insert paragraphs (a) through (d) of this clause in all subagreements or subcontracts, and shall require their inclusion in all subagreements or subcontracts of any tier.

(e) Records. - The Districts shall maintain payroll records containing the information specified in 29 CFR 516.2(a). Such records shall be preserved for 3 years after the termination of this Agreement.

OFFICIALS NOT TO BENEFIT

20. (a) No Member of or Delegate to Congress, Resident Commissioner, or official of the Districts shall benefit from this Agreement other than as a water user or landowner in the same manner as other water users or landowners.

CONTINGENT ON APPROPRIATION OR ALLOTMENT

OF FUNDS

21. The expenditure or advance of any money or the performance of any obligation of the United States under this Agreement shall be contingent upon appropriation or allotment of funds. No liability shall accrue to the United States in case funds are not appropriated or allotted.

CLEAN AIR AND WATER

22. The Districts shall include the following provisions in all subcontracts related to this Agreement that are in excess of $100,000, or if a facility to be used has been the subject of a conviction under the Clean Air Act [42 U.S.C. 1857c-8(c)(1)] or the Federal Water Pollution Control Act [33 U.S.C. 1319(c)] and is listed by EPA:

(a) The subcontractor agrees as follows:

(1) To comply with all the requirements of Section 114 of the Clean Air Act, as amended (42 U.S.C., 1857 et seq., as amended by Public Law 91-604) and Section 308 of the Federal Water Pollution Control Act (33 U.S.C., 1251 et seq., as amended by Public Law 92-500), respectively, relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in Section 114 and Section 308 of the Air Act and the Water Act, respectively, and all regulations and guidelines issued thereunder before the execution of this Agreement.

(2) That no portion of the work required by this Agreement will be performed in a facility listed on the Environmental Protection Agency List of Violating Facilities on the date this Agreement was executed unless and until the EPA eliminates the name of such facility or facilities from such listing.

(3) To use their best efforts to comply with clean air standards and clean water standards at the facility where the Agreement work is being performed.

(4) To insert the substance of the provisions of

this article into any nonexempt subcontract, including this paragraph (a)(4).

(b) The terms used in this article have the following meanings:

(1) The term "Air Act" means the Clean Air Act, as amended (42 U.S.C. 1857 et seq., as amended by Public Law 91-604).

(2) The term "Water Act" means Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq., as amended by Public Law 92-500).

(3) The term "clean air standards" means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted pursuant to the Air Act or Executive order 11738, an applicable implementation plan as described in Section 110(d) of the Clean Air Act [42 U.S.C. 1857c-5(d)], an approved implementation procedure or plan under Section 111(c) or Section 111(d), respectively, of the Air Act [42 U.S.C. 1857c-6(c) or (d)] , or an approved implementation procedure under Section 112(d) of the Air Act [42 U.S.C. 1857c-7(d)].

(4) The term "clean water standards" means any enforceable limitation, control, condition, prohibition, standard, or other requirement which is promulgated pursuant to the Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency or by a State under an approved program, as authorized by Section 402 of the Water Act (33 U.S.C. 1342), or by local government to ensure compliance with pretreatment regulations as required by Section 307 of the Water Act (33 U.S.C. 1317).

(5) The term "comply" means compliance with clean air or water standards. Comply shall also mean compliance with a schedule or plan ordered or approved by a court of competent jurisdiction, the Environmental Protection Agency or an air or water pollution control agency in accordance with the requirements of the Air Act or Water Act and regulations issued pursuant thereto.

(6) The term "facility" means any building, plant, installation, structure, mine, vessel or other floating craft, location, or site of operations, owned, leased, or supervised by the Districts or their subcontractor, to be utilized in the performance of this Agreement. Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility except where the Director, Office of Federal Activities, Environmental Protection Agency, determines that independent facilities are collocated in one geographical area.

23. DELETED

UTILIZATION OF SMALL BUSINESS CONCERNS AND SMALL BUSINESS DISADVANTAGED CONCERNS

24. It is the policy of the United States that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in performing grants and cooperative agreements awarded by any Federal agency.

The Districts hereby agree to carry out this policy in the awarding of subagreements and contracts to the fullest extent consistent with efficient grant/cooperative agreement performance. The Districts further agree to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the recipient's compliance with this clause.

As used in this agreement the term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern:

(a) Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals; or in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

(b) Whose management and daily business operations are controlled by one or more of such individuals.

The Districts shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

The Districts acting in good faith may rely on written representation by their agents or contractors regarding their status as either a small business concern or a small business concern owned and controlled by socially and economically disadvantaged individuals.

EXAMINATION OF RECORDS

25. (a) (1) The Districts agree to maintain books, records, documents, and other evidence pertaining to the costs and expenses of this Agreement (hereinafter collectively called "records") to the extent and in such detail as will properly reflect all net costs, direct and indirect, or labor, materials, equipment, supplies and services, and other costs and expenses of whatever nature for which reimbursement is claimed under the provisions of this Agreement.

(2) The Districts agree to make available at its office(s) at all reasonable times during the period set forth in subparagraph (4) below any of the records for inspection, audit, or reproduction by any authorized representative of the Comptroller General and RGCAO.

(3) In the event the Comptroller General or any of his duly authorized representatives determine that his audit

of the amounts reimbursed under this agreement as transportation charges will be made at a place other than the offices of the Districts, the Districts agree to deliver, with the reimbursement voucher covering such charges or as may be otherwise specified within 2 years after reimbursement of charges covered by any such voucher, to such representative as may be designed for that purpose through the RGCAO, such documentary evidence in support of transportation costs as may be required by the Comptroller General or any of his duly authorized representatives.

(4) Except for documentary evidence delivered to the United States pursuant to subparagraph (3) above, the Districts shall preserve and make available its records (i) until expiration of 3 years after final payment under this Agreement or of the time periods for the particular records specified in Subpart 4.7 of the Federal Acquisition Regulations (48 CFR Subpart 4.7), whichever expires earlier, and (ii) for such longer period, if any, as is required by applicable statutes, by any other clause of this Agreement, or by (a) or (b)below:

(a) If this Agreement is completely or partially terminated, the records relating to the work terminated shall be preserved and made available for a period of 3 years from the date of any resulting settlement.

(b)Records which relate to (i) litigation or the settlement of claims arising out of the performance of this Agreement, or (ii) costs and expenses of this agreement as to which exception has been taken by the Comptroller General or the RGCAO, or any of their duly authorized representatives, shall be retained by the Districts until such appeals, litigation, claims, or exceptions have been disposed of.

(5) Except for documentary evidence delivered pursuant to subparagraph (3) above, and the records described in subparagraph (4)(b) above, the Districts may in fulfillment of their obligation to retain their records as required by this clause substitute photographs, microphotographs, or other authentic reproductions of such records, after the expiration of 2 years following the last day of the month of reimbursement to

the Districts of the invoice or voucher to which such records relate, unless a shorter period is authorized by the RGCAO with the concurrence of the Comptroller General or his duly authorized representative.

(6) The provisions of this paragraph (a), including this subparagraph (6), shall be applicable to and included in each subcontract hereunder which is on a cost, cost-plus-a-fixed-fee, time-and-material, or labor-hours basis.

(b) The Districts further agree to include in each of their subagreements or subcontracts, hereunder, other than those set forth in subparagraph (a)(6) above, a provision to the effect that the subcontractor agrees that the Comptroller General and the RGCAO, or any of their duly authorized representatives, shall, until the expiration of 3 years after final payment under the subagreement or subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records, of such subcontractor, involving transactions related to the subcontractor. The terms "subagreement or subcontract," as used in this paragraph (b) only, exclude (i) purchase orders not exceeding $10,000 and (ii) subagreements or subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

LIMITATION OF COST

26. (a) It is estimated that the total cost to the United States for the performance of this Agreement for October 1, 1985 through September 30, 1986 is $298,091.00, and the Districts agree to use their best efforts to perform the work specified in the Agreement and all obligations under this Agreement within such estimated cost. If, at any time, the Districts have reason to believe that the costs which they expect to incur in the performance of this Agreement in the next succeeding 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost, or if, at any time, the Districts have reason to believe that the total cost

to the United States for the performance of this Agreement, exclusive of any fee, will be greater or substantially less than the then estimated cost, Madera Irrigation District shall notify the RGCAO in writing to that effect, giving the revised estimate of such total cost for the performance of this Agreement.

(b) The following are estimates of budget amounts for years two (2) through seven (7) of this Agreement. These estimates are not binding on either of the parties and are for informational purposes only:

Federal Fiscal Year	Amount
1987	$ 312,996
1988	$ 328,646
1989	$ 345,078
1990	$ 362,332
1991	$ 380,449
1992	$ 399,471

(c) Except as required by other provisions of this Agreement specifically citing and stated to be an exception from this clause, the Government shall not be obligated to reimburse the Districts for costs incurred in excess of the estimated cost set forth in the annual O&M budget and the Districts shall not be obligated to continue performance under the Agreement or otherwise to incur costs in excess of the estimated cost set forth in the annual O&M budget, unless and until the RGCAO shall have notified the Districts in writing that such estimated cost has been increased and shall have specified in such notice a revised estimated cost which shall thereupon constitute the estimated cost of performance of this Agreement. No notice, communication, or representation in any other form or from any person other than the RGCAO shall effect the estimated cost of this Agreement. In the absence of the specified notice, the United States shall not be obligated to reimburse the Districts for any costs in excess of the estimated cost set forth in the budget. When and to the extent that the

estimated cost set forth in the budget has been increased, any costs incurred by the Districts in excess of the estimated cost prior to such increase shall be allowable to the same extent as if such costs has been incurred after the increase.

INSPECTION

27. The United States, through any authorized representative, has the right at all reasonable times, to inspect, or otherwise evaluate the work performed or being performed hereunder and the premises in which it is being performed. If any such inspection or evaluation is made on the premises of the Project works, the Districts shall provide all reasonable facilities and assistance for the safety and convenience of the United States' representatives in the performance of these duties. All inspections and evaluations shall be performed in such a manner as will not unduly delay the Districts' activities under this Agreement.

RECLAMATION REFORM ACT

28. This agreement does not constitute a contract or an amendment to a contract with the United States as described in Section 203 (a)(2) of the Reclamation Reform Act of 1982 or the implementing rules and regulations.

IN WITNESS WHEREOF, the parties have executed this Agreement, on the date first above written.

THE UNITED STATES OF AMERICA

By_____/s/_____
Regional Grants and Cooperative
Agreements Officer
Bureau of Reclamation

MADERA IRRIGATION DISTRICT

(SEAL)

By_____/s/_____
President

Attest:

_____/s/_____
Secretary

CHOWCHILLA WATER DISTRICT

By_____/s/_____
President

Attest:

_____
Secretary

EXHIBIT C

Claim Form

COPY

(A claim shall be presented by the claimant or by a person acting on his behalf.)

NAME OF DISTRICT: Madera Irrigation District, 12152 Rd. 28 1/4, Madera, CA 93637

Name, address, mailing address if different, and phone number.

Name: Central Green Company, c/o Larry Freels

Address(es): 15737 Rd. 204, Madera, CA 93638

Phone Number: (209) 822-2800

2 List name, address and phone number of any witnesses.

Name:	Larry Freels; Cory Goin	Bob Stanfield-Mgr. MID	Bureau of Reclamation
Address:	Central Green (see above)	1252 Rd. 28 1/4	William H. Luce, Jr.
Phone Number:	Same as above	Madera, CA 93638	2666 N. Grove Ind. , Fresno 93727

3 List the date, time, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted.

Date: Now Time: Now Place: Central Green River Ranch, at Road 204 & the San Joaquin River - Madera County

Tell What Happened (give complete information): The Madera Canal runs through the center of my pistachio ranch. The water is and has been leaking from the canal. The flooding has killed trees and makes farming and harvesting expensive and difficult. Approx. 30 acres of mature pistachio trees are affected.

NOTE: Attach any photographs you may have regarding this claim.

4 Give a general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim.

Known damages include 1) loss of past production in trees; 2) death of trees; 3) additional farming costs; and 4) loss of future production.

5 Give the name or names of the public employee or employees causing the injury, damage, or loss, if known.

Contact person at MID: Bob Stanfield, Manager

6 If the actual amount of your claim is less than $10,000 indicate the exact amount of your claim, and if possible show specific itemization and/or include copies of any documents in support thereof. If the amount of the claim exceeds $10,000, no dollar amount should be included in this claim form. However, it is necessary to indicate whether jurisdiction will rest in Municipal or Superior Court. (Jurisdiction for any claim under $25,000 would rest in Municipal Court, and any claim over $25,000 would rest in Superior Court.)

Jurisdiction will rest in Superior Court as Central Green's damages are far in excess of $25,000.00. (Jurisdiction may also be proper in Federal Court.)

Date: 6/10/95 Time: 2:00 p.m. Signature:

000050

ANSWER ALL QUESTIONS. OMITTING INFORMATION COULD MAKE YOUR CLAIM LEGALLY INSUFFICIENT!

White - JPIA Office Copy / Yellow - District Office Copy / Pink - Claimant Copy

CLM-CF 042591

49

BEST AVAILABLE COPY

EXHIBIT D

MADERA
IRRIGATION
DISTRICT

12152 ROAD 28¼
MADERA, CA 93637
(209) 673-3514
(209) 268-2483
FAX (209) 673-0564

June 29, 1995

Central Green Company
15737 Road 204
Madera, CA. 93638

BOARD OF DIRECTORS

H. ROCKY TERANISHI
President

DONALD A.SIMI
Vice President

JOHNNY DENIZ
RONALD H. PISTORESI
FRED L. VALENZUELA,JR.
ROBERT L. STANFIELD
General Manager-Chief Engineer
CYNTHIA A. RASCOE
Secretary
FRANKLIN B.SECARA
Treasurer
CHARLES J. KETTER
Controller - Assessor - Collector
DENSLOW GREEN
Legal Counsel

Dear Mr. Freels:

NOTICE IS HEREBY given that the claim which you presented to the Madera Irrigation District on June 10, 1995 was rejected on its Merits.

WARNING

Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a State Court Action on this claim. See Government Code Section 945.6. Your time for filing an action in federal court may be less than this six months. You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.

In providing this notice, or by any other action it has taken on this claim, the Madera Irrigation District does not intend to relinquish or waive any of your legal claims requirements or any rights or defenses potentially available to Madera Irrigation District or its officers, employees or agents.

Should you file a lawsuit in this matter which is determined to be in bad faith and without reasonable cause, please be advised that Madera Irrigation District will attempt to recover all of its defense costs from you as allowed by California Code of Civil Procedure aracles 128.5 and 1038.

If you have any questions about your claim, or this letter, please call the undersigned at 209-673-3514.

Yours very truly,
/s/
Charles J. Ketter
Controller-Assessor-Collector
Enclosure

EXHIBIT E

BEST AVAILABLE COPY

Sept. II

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED
OMB NO. 1105-0008
EXPIRES 4-30-88

Submit To Appropriate Federal Agency:
Bureau of Reclamation
Attn: Rik Arndt
2666 N. Grove Industrial Dr. #106
Fresno, California 93727-1551

2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.) (Number, street, city, State and Zip Code)*
Central Green Company - River Ranch
15737 Road 204
Madera, CA 93638
c/o Larry Freels

3. TYPE OF EMPLOYMENT ☐ MILITARY ☐ CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME *(A.M. OR P.M.)*
			See Attachment "A"	

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurence and the cause thereof) (Use additional pages if necessary.)*

Central Green River Ranch is a large pistachio ranch. The Madera Canal runs through the property. The canal is and has been leaking, causing severe flooding to parts of the orchard. Trees have been killed, production lost and farming costs increased. William Luce, of the Bureau is aware of the problems as Bureau representatives have been to the property and have promised that remedial action will be taken.

PROPERTY DAMAGE

9. NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*

10. BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)* Central Green's River Ranch - Rd. 204 and San Joaquin River - Pistachio Ranch; Mature pistachio trees have been killed; Have experienced loss of past & future production; Flooding to property; Approx. 30 acres of mature pistachio trees are affected.

PERSONAL INJURY/WRONGFUL DEATH

11. STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

WITNESSES

NAME	ADDRESS *(Number, street, city, State, and Zip Code)*
Larry Freels	Central Green Co. - See Above.
Cory Goins	Central Green Co. - See Above.
William Luce, Jr.	Bureau of Reclamation
Bob Stanfield	Madera Irrig. Dist., 12152 Rd. 28 1/4, Madera, CA 93637

12. *(See instructions on reverse)* **AMOUNT OF CLAIM *(in dollars)***

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
$125,000.00			$125,000.00

13. CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone number of signatory	14. DATE OF CLAIM
	(209) 822-2800	7/27/95

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM
The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States *(See 31 U.S.C. 3729.)*

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
Fine of not more than $10,000 or imprisonment for not more than 5 years or both *(See 18 U.S.C. 287, 1001.)*

000054

95-107
NSN 7540-00-634-4046
PREVIOUS EDITIONS NOT USABLE
STANDARD FORM 95 (Rev. 2-86)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

Attachment "A"
To
Claim For Damage, Injury, Or Death

6. Date and Day of Accident.

The canal continues to leak as of the date of this claim. The date the canal first began to leak is presently unknown.

EXHIBIT F

United States Department of the Interior

OFFICE OF THE SOLICITOR

Pacific Southwest Region
2800 Cottage Way
Room E-2753
Sacramento, California 95825-1890

IN REPLY REFER TO

LBR.PS.0402
T-S-168

Certified Mail--Return Receipt Requested

Central Green Company
River Ranch
Attn: Larry Freels
15737 Road 204
Madera, CA 93638

Claimant: (same)
Date of Claim: 7/27/95
Date of Incident: 1995
Place of Incident: Near Mile 2.9
Madera Canal, Central Valley Project

Dear Mr. Freels:

You have filed a claim in the amount of $125,000.00, pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, which provides for settlement of claims for damages caused by the negligent act of omission of a government employee while acting within the scope of his/her employment under certain specified circumstances. This claim has been referred to this office for consideration.

The administrative record fails to disclose any factual or legal basis to support a finding that the United States is responsible for the injury or damage claimed by you. Consequently, this claim must be and is hereby denied.

If you are dissatisfied with this finding, you are entitled to resubmit this claim, together with your reasons for resubmission, to the Regional Solicitor, Pacific Southwest Region, Attn: Frank Wilson, 2800 Cottage Way, Room E-2753, Sacramento, California 95825, within six months from the date of the mailing of this decision, or you may file an action in the United States District Court within six months from the date of the mailing of this decision.

Sincerely,

/s/

David Nawi
Regional Solicitor

CHARLES J. STEVENS
United States Attorney
DANIEL E. BENSING
Assistant United States Attorney
Eastern District of California
3654 Federal Building
1130 0 Street
Fresno, California 93721
Telephone: (209) 498-7272

Attorneys for Plaintiff United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CENTRAL GREEN CO.,	CV-F-96-5541-REC-SMS
Plaintiffs,	
v.	ANSWER OF UNITED STATES TO Plaintiff's FIRST AMENDED COMPLAINT
UNITED STATES OF AMERICA, MADERA IRRIGATION DISTRICT,	
Defendants.	

Defendant, in answer to plaintiffs' complaint, hereby answer and assert affirmative defenses as follows:

ANSWER

1. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in the paragraph 1.

2. The allegations set forth in the first sentence of paragraph 2 are admitted. In response to the allegations set forth in the second sentence of paragraph 2, the United States admits only that the Bureau of Reclamation is an agency within the Department of the Interior of the United States and that the Bureau of Reclamation, among other things, owns certain canals in Madera County, California.

3. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in the paragraph 3.

4. The first sentence of paragraph 4 is a statement of venue and, as such, is a legal conclusion to which no response is required. The second sentence of paragraph 4 is a statement of jurisdiction and, as such, is a legal conclusion to which no response is required.

5. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in the paragraph 5.

6. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in the paragraph 6.

7. In response to the allegations set forth in paragraph 7, the United States admits only that the United States planned, designed, and constructed the Madera Canal which is used, among other things, to convey water to various lands in the San Joaquin Valley.

8. The United States admits the allegations set forth in paragraph 8.

9. The United States denies the allegations set forth in paragraph 9.

10. The United States denies the allegations set forth in the first and third sentences of paragraph 10. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in the second sentence of paragraph 10.

11. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in paragraph 11.

12. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in paragraph 12.

13. In response to the allegations set forth in the first sentence of paragraph 13, the United States admits only that on August 16, 1995, the Bureau of Reclamation received a claim for damages in the amount of $125,000.00 from "Central Green Company - River Ranch." The United States denies the allegations set forth in the second sentence of paragraph 13.

14. In response to the allegations set forth in paragraph 14, the United States admits only that on December 11, 1995, the United States, through the Department of the Interior, denied the claim of "Central Green Company - River Ranch" described in the previous paragraph and that Plaintiff's Exhibit F is a true and correct copy of that denial.

15. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in paragraph 15.

16. In response to the allegations of paragraph 16, the United States incorporates by reference its responses to paragraphs 1 through 15 above.

17. The United States denies the allegations set forth in paragraph 17.

18. The United States denies the allegations set forth in paragraph 18.

19. The United States denies the allegations set forth in paragraph 19.

20. The United States denies the allegations set forth in paragraph 20.

21. In response to the allegations of paragraph 21, the United States incorporates by reference its responses to paragraphs 1 through 20 above.

22. The United States denies the allegations set forth in paragraph 22.

23. The United States denies the allegations set forth in paragraph 23.

24. The United States denies the allegations set forth in paragraph 24.

25. The United States denies the allegations set forth in paragraph 25.

26. The United States denies the allegations set forth in paragraph 26.

27. The United States denies the allegations set forth in paragraph 27.

28. The United States denies the allegations set forth in paragraph 28.

29. In response to the allegations of paragraph 29, the United States incorporates by reference its responses to paragraphs 1 through 28 above.

30. The United States denies the allegations set forth in paragraph 30.

31. The United States denies the allegations set forth in paragraph 31.

32. In response to the allegations of paragraph 32, the United States incorporates by reference its responses to paragraphs 1 through 31 above.

33. The United States denies the allegations set forth in paragraph 33.

34. The United States denies the allegations set forth in paragraph 34.

Defendant denies that Plaintiffs are entitled to any of the relief requested. Defendants hereby deny each and every allegation not previously admitted.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

This Court has no jurisdiction to hear Plaintiff's second, third, and fourth claims because pursuant to 33 U.S.C. § 702c, the United States has not waived its sovereign immunity in cases involving flood control projects where damage is caused by flood waters, as was the case here.

THIRD AFFIRMATIVE DEFENSE

This Court has no jurisdiction to hear Plaintiff's second, third, and fourth claims because pursuant to 28 U.S.C. § 2680(a), the United States has not waived its sovereign immunity in cases where the alleged act or omission of an employee of the United States is a discretionary function, as was the case here.

FOURTH AFFIRMATIVE DEFENSE

This Court has no jurisdiction to hear Plaintiff's first claim because pursuant to 28 U.S.C. § 1491(a)(1), the Court of Federal Claims has exclusive jurisdiction to hear cases arising under the Fifth Amendment of the United States Constitution where the requested relief is greater than $10,000.

FIFTH AFFIRMATIVE DEFENSE

To the extent that plaintiff is requesting relief for past damages, pursuant to 28 U.S.C. § 2401(b), this Court lacks jurisdiction to adjudicate damages occurring more than two years prior to the submission of Plaintiff's administrative claim.

The United States therefore respectfully requests that this Court issue an order

1. Dismissing the complaint with prejudice;
2. Assessing the costs of this litigation against plaintiffs; and
3. Granting such other relief as the court may deem just and proper.

Respectfully submitted,

Dated: 8- 6-96

CHARLES J. STEVENS
United States Attorney

By: /s/
DANIEL E. BENSING
Assistant U.S. Attorney

TIMOTHY JONES, #119841

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP
Post Office Box 28912
5 River Park Place East
Fresno, California 93729-8912
Telephone: (209) 433-1300

W. ALLEN BENNETT, #171963
General Counsel, Central Green Company
15737 Road 204
Madera CA 93638
Telephone: (209) 822-2800

Attorneys for: CENTRAL GREEN COMPANY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CENTRAL GREEN COMPANY, a California Limited Partnership, Plaintiff, vs. UNITED STATES OF AMERICA; MADERA IRRIGATION DISTRICT, Defendants.	CASE NO. CV-F-965541 REC SMS REQUEST FOR INSPECTION AND PRODUCTION OF DOCUMENTS TO THE UNITED STATES OF AMERICA

PROPOUNDING PARTY: Plaintiff, CENTRAL GREEN COMPANY

RESPONDING PARTY: Defendant, THE UNITED STATES OF AMERICA

SET NO.: ONE (1)

Plaintiff CENTRAL GREEN COMPANY requests that Defendant UNITED STATES OF AMERICA ("UNITED STATES") produce the following documents within thirty (30) days pursuant to the Federal Rules of Civil Procedure 34.

The UNITED STATES is hereby requested to provide all information and produce all documents within the knowledge, possession, custody, or control of its agents, employees, attorneys, investigators, or any agents of the foregoing, or any other person who has made this information known or available to it, or from whom it can obtain this information.

This request for document production shall be continuing and supplemental responses hereto shall be required immediately if the UNITED STATES obtains further or different information from the time the responses hereto are made until the time of trial.

DEFINITIONS AND INSTRUCTIONS

The following definitions and instructions are to be considered applicable with respect to each demand for production of documents contained herein.

A. Definitions.

1. "CENTRAL GREEN" shall refer to the Plaintiff, CENTRAL GREEN COMPANY, and its attorney, representatives and agents.

2. "UNITED STATES" shall mean and refer to Defendant, the Department of the Interior of the United States of America, Bureau of Reclamation, and its officers, directors, employees, attorneys, accountants, realtors, consultants, agents, representatives, persons engaged by it or its attorneys as an expert witness in any litigation or arbitration, and anyone else who has acted for or on its behalf.

3. "DISTRICT" shall refer to Defendant, MADERA IRRIGATION DISTRICT and its attorneys, representatives, employees and agents.

4. "MADERA CANAL" shall refer to the canal which gives rise to the subject litigation.

4. The terms "YOU" or "YOUR" shall refer to

Defendant UNITED STATES OF AMERICA and any counsel, consultants, experts, investigators, employees, agents or other persons acting on its behalf with the exception of its attorneys of record herein.

5. "WRITING" shall be understood to apply to any record or communication, including records of any telephonic communications, that would be a "writing," "recording" or "photograph" as provided by the Federal Rule of Evidence 1001, and shall include, without limitation, originals, duplications or copies (with or without notes or changes thereon), drafts, working papers, routing slips, and similar materials as well as machine readable data stored on cards, disks, magnetic tapes or other storage media.

6. The terms "DOCUMENT" or "DOCUMENTS" as used herein shall mean the original and all non-identical copies, duplicates, and reproductions on any medium from which intelligence or information can be retrieved. The term shall include, without limitation, any and all of the following:

> Letters, books, reports, summaries, studies, statements, speeches, notebooks, invoices, schedules, financial books and records, checks, telegrams, telexes, recordings on computer disk or tape or other data processing storage devices, telecopier transmittals, applications, agreements, appointment calendars, working papers, graphs, manuals, brochures, contracts, memoranda, notes, records, correspondence, diaries, bookkeeping entries, and any published materials, and matter that concerns, reflects, embodies or relates to oral communications.

The term shall include, without limitation, each and every copy, duplicate, reproduction, prior draft, excerpt, note, summary, or any matter prepared from any of the foregoing which differs from the original due to corrections, alterations, notations, deletions, marginalia, confirmation, routing instructions or records, or otherwise.

B. Instructions.

1. Original Form. CENTRAL GREEN requests that all documents be produced in the form in which they are found in their normal filing place, including the document file folder or other bindings in which they are regularly maintained.

2. Documents Not Produced.

Whenever a document is not produced in full, please state with particularity the reason it is not being produced in full, and describe, to the best of your knowledge, information and belief and with as much particularity as possible, those portions of the document which were not produced.

3. Privilege Log. As to any document that is requested for which a privilege or other protection from disclosure is asserted, specify the specific ground for each privilege or protection claimed and identify the document with particularity, including the date, author, subject matter, recipients thereof, and number of pages.

4. Construction of Conjunctives. The conjunctives "and" and "or" as used herein shall be construed both conjunctively and disjunctively, and each shall include the other wherever such dual construction will serve to bring within the scope of this request any documents which would otherwise not be brought within its scope.

REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1:

Each and every document and/or writing, including plans, drawings, specifications and/or maps which relate to the design and construction of the MADERA CANAL.

REQUEST NO. 2:

Each and every document and/or writing which relate in any manner to the as-built plans of the MADERA CANAL.

REQUEST NO. 3:

Each and every document and/or writing which relate in any manner to any and all leaks and/or water seepage from the MADERA CANAL.

REQUEST NO. 4:

Each and every document and/or writing which in any manner relate to any testing performed with respect to leaks and/or water seepage from the MADERA CANAL.

REQUEST NO. 5:

Each and every document and/or writing which in any manner relate to any repairs made at any location along the MADERA CANAL with respect to leaks and/or water seepage from the MADERA CANAL.

REQUEST NO. 6:

Each and every document and/or writing which support, evidence or establish any agreements between defendants UNITED STATES and the DISTRICT relative to the MADERA CANAL.

REQUEST NO. 7:

Each and every document and/or writing which relate in any manner to the maintenance of the MADERA CANAL.

REQUEST NO. 8:

Each and every document and/or writing which relate in any manner to the operation of the MADERA CANAL.

REQUEST NO. 9:

Each and every document and/or writing contained in YOUR entire file which relate in any manner to CENTRAL GREEN.

REQUEST NO. 10:

Each and every document and/or writing contained in YOUR entire file which relate in any manner to the DISTRICT.

REQUEST NO. 11:

All correspondence between the UNITED STATES and anyone regarding leaks and/or seepage of water from the MADERA CANAL onto or under CENTRAL GREEN or its predecessor in interest's real property.

DATED: September 12, 1996

McCORMICK, BARSTOW, SHEPPARD
WAYTE & CARRUTH LLP

By: /s/
TIMOTHY JONES

TIMOTHY JONES, #119841

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP
Post Office Box 28912
5 River Park Place East
Fresno, California 93729-8912
Telephone: (209) 433-1300

W. ALLEN BENNETT, #171963
General Counsel, Central Green Company
15737 Road 204
Madera CA 93638
Telephone: (209) 822-2800

Attorneys for: CENTRAL GREEN COMPANY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CENTRAL GREEN COMPANY, a California Limited Partnership,	)	CASE NO. CV-F-965541 REC SMS
	)	SCHEDULING CONFERENCE STATEMENT
Plaiutiff,	)	
vs.	)	DATE: September 26, 1996
	)	TIME: 10:00 a.m.
	)	CTRM: 4
UNITED STATES OF AMERICA; MADERA IRRIGATION DISTRICT,	)	Trial Date: None
Defendants.	)	

I

PARTIES AND PLEADINGS

1. Plaintiff CENTRAL GREEN COMPANY is a limited partnership which owns certain real property located in Madera County, California most of which is planted to pistachios ("CENTRAL GREEN"). CENTRAL GREEN is represented by Timothy Jones of McCormick, Barstow, Sheppard, Wayte & Carruth.

2. Defendant UNITED STATES OF AMERICA has been sued because through the Department of Interior and the Bureau of Reclamation the UNITED STATES OF AMERICA

owns the Madera Canal located in Madera County, California used for the delivery of irrigation water which passes through Plaintiff's real property ("UNITED STATES"). The UNITED STATES is represented by Charles J. Stevens and Daniel E. Bensing of the United States Attorney's Office.

3. Defendant MADERA IRRIGATION DISTRICT has an agreement with the UNITED STATES to operate and maintain the Madera Canal ("MID"). MID is represented by Rick Jensen of Hager, Trippel, Macy & Jensen.

4. The First Amended Complaint is styled in four claims for Inverse Condemnation (First Claim), Continuing Nuisance (Second Claim), Continuing Trespass (Third Claim) and Dangerous Condition of Real Property (Fourth Claim). All of the claims arise out of damages which allegedly have been and are continuing to be incurred by CENTRAL GREEN for water which is leaking out of the Madera Canal onto and under Plaintiff's property damaging pistachio trees and increasing cultural costs of the property.

5. UNITED STATES answered the First Amended Complaint denying the material allegations thereof and alleging affirmative defenses of failure to state a claim, lack of subject matter jurisdiction, sovereign immunity and statute of limitations. MID answered the First Amended Complaint denying the material allegations thereof and alleging affirmative defenses of failure to state a claim, bar of limitations, laches, Plaintiff's negligence, Plaintiff's intentional conduct, assumption of the risk, failure to mitigate damages, intervening/superseding causes, act of God/natural condition, prescriptive easement, coming to the nuisance, privilege, lack of unreasonable interference, equitable estoppel, authorized conduct, and intervening superseding cause.

II

LEGAL CONTENTIONS

A. Plaintiff's Legal Contentions

6. CENTRAL GREEN contends that water is leaking from the Madera Canal onto and under its property thereby constituting a trespass, nuisance and inversely condemning its property since the escaping water has damaged the roots of its trees and increased its cultural costs due to the problems associated with having excess water on its property which interferes with normal cultural practices. Additionally, the value of the land is diminished to the extent the trespass and/or nuisance cannot be completely abated such that defendants have inversely condemned Plaintiff's property.

7. Plaintiff asserts that either or both the UNITED STATES and MID are responsible for the leakage problem. The UNITED STATES constructed and generally has maintained the Madera Canal for some period of time. The UNITED STATES has entered into an agreement with MID whereby MID is allowed to flow water through the canal in return for which MID must maintain the canal to prevent leakage of the type that is occurring.

8. While plaintiff understands that both MID and the UNITED STATES want to point the finger at each other (MID contends it is a construction problem while the UNITED STATES contends it is a maintenance problem) one thing is clear, the canal leaks and it is damaging Plaintiff's property.

9. Plaintiff asserts that jurisdiction is appropriate in this Court since the UNITED STATES is a party and further that venue is appropriate since the real property in issue is located in Madera County, California.

B. Defendants Legal Contentions

10. The UNITED STATES contends that the to the extent any water is leaking from the Madera Canal it is MID's responsibility for maintaining the canal and that it either is directly responsible to plaintiff for any such leakage or is

required to indemnify the UNITED STATES to the extent such leakage occurs and is subject to the provisions of the agreement between the UNITED STATES and MID.

11. The UNITED STATES further contends that this Court is not the appropriate court for litigation of Plaintiff's inverse condemnation claim and that the Court of Claims is the only appropriate court, and that Plaintiff's claims are barred by flood water immunity, discretionary function immunity and statute of limitations.

12. MID contends that if the Madera Canal is leaking onto Plaintiff's property it is a construction defect, not the subject of its maintenance agreement with the UNITED STATES and therefore MID is not responsible for the alleged leakage.

13. Defendants do not challenge venue in this Court but the UNITED STATES asserts lack of jurisdiction as mentioned above.

III

FACTS

A. Admitted Facts Which Are Deemed Proven Without Further Proceedings.

1. The Madera Canal passes through portions of Plaintiff's property.

2. The UNITED STATES constructed the Madera Canal through the Department of Interior, United States Bureau of Reclamation.

3. The UNITED STATES entered into an agreement with MID whereby MID was allowed to flow water through the Madera Canal on the terms and conditions specifically set forth in the agreement.

B. Contested Facts

1. Whether Water has been leaking from the Madera Canal onto and under Plaintiff's property.

2. Whether the cause of water leaking from the Madera Canal onto and under Plaintiff's property is a construction defect or a problem caused by poor maintenance.

3. Whether sufficient water has leaked from the Madera Canal to cause damage to Plaintiff's trees.

4. Whether sufficient water has leaked from the Madera Canal to increase Plaintiff's cultural costs and the extent of such increase.

5. Whether the water which has leaked from the Madera Canal has inversely condemned Plaintiff's property by causing damages of the type constituting inverse condemnation.

6. The value of Plaintiff's property.

7. The value of Plaintiff's trees which have been damaged.

8. The amount of cultural costs plaintiff has incurred in dealing with water which has leaked from the Madera Canal.

9. Whether plaintiff properly complied with governmental claim statutes.

10. Whether defendants properly denied Plaintiff's governmental claims.

11. Whether water leaking from the Madera Canal has caused a nuisance on Plaintiff's property.

12. Whether water leaking from the Madera Canal has caused a trespass to Plaintiff's property.

13. Whether water leaking from the Madera Canal has created a dangerous condition of real property.

14. Whether plaintiff failed to timely file this complaint under relevant Code of Civil Procedure §§ 337.1, 337.15, 338 and 343.

15. Whether plaintiff was negligent relative to its operation of the subject real property and thereby caused any of its own damages.

16. Whether plaintiff intentionally caused any of its own damages.

17. Whether plaintiff assumed the risk of any of the damages alleged in the complaint.

18. Whether plaintiff failed to mitigate its damages.

19. Whether actions of plaintiff were caused by intervening or superseding causes unrelated to these defendants.

20. Whether the injuries to plaintiff were caused by a natural condition and/or an act of God sufficient to bar any claim by way of the First Amended Complaint.

21. Whether a prescriptive easement bars Plaintiff's claims.

22. Whether plaintiff "came to the nuisance" thereby barring it from any relief alleged in the First Amended Complaint.

23. Whether or not any of defendants' conduct was privileged.

24. Whether defendants' conduct does not constitute an unreasonable interference with the use of Plaintiff's land.

25. Whether plaintiff is equitably estopped from asserting the claims of the complaint.

26. The nature and extent of Plaintiff's claimed damages.

27. When Plaintiff's injuries occurred.

28. Whether any actions by the UNITED STATES which allegedly caused Plaintiff's injuries were motivated by economic and social policy factors.

IV

AMENDMENTS, DATES AND OTHER ISSUES

A. Amendment Of Pleadings

14. The parties do not anticipate amending the pleadings at this time.

B. Discovery Plan And Cut-Off Dates

15. The parties are ordered to complete all discovery on or before November 7, 1997.

16. The parties are ordered to exchange expert witness disclosures on or before August 15, 1997. Local Rule 253(b) notwithstanding, the written designation of experts shall be made pursuant to Federal Rule of Civil Procedure Rule 26(a)(2), (A) and (B) and shall include all information required thereunder. The provisions of Federal Rule of Civil Procedure Rule 26(b)(4) shall apply to all discovery related to experts in their opinions. The parties shall be allowed to depose expert witnesses whose depositions shall be completed on or before November 7, 1997.

C. Pre-Trial Motions Schedule

17. All non-dispositive pre-trial motions, including any discovery motions, are to be filed on or before November 24, 1997 and heard on Mondays at 10:00 a.m. in Courtroom 4 before the Honorable Sandra M. Snyder, United States Magistrate Judge.

18. All dispositive pre-trial motions are to be filed on or before December 15, 1997, and are to be heard on Mondays at 1:30 p.m. in Courtroom 1 before the Honorable Robert E. Coyle, United States District Court Judge.

D. Pre-Trial Conference Date

19. February 2, 1998, at 2:00 p.m. in Courtroom 4 before the Honorable Sandra M. Snyder, United States Magistrate Judge.

E. Trial Date

20. March 24, 1998, at 10:00 a.m. in Courtroom 1 before the Honorable Robert E. Coyle, United States District Court Judge.

21. All parties except the UNITED STATES have requested trial by jury. Counsel estimate that it will take 7 court days to try the case.

F. Settlement Conference

22. To be established by the Court.

G. Request For Bifurcation, Appointment Of Special Master Or Other Techniques To Shorten Trial

23. Reserved.

H. Related Matters Pending

24. There are no pending related matters.

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP

DATED: September 19, 1996 By: /s/
TIMOTHY JONES

HAGER, TRIPPEL, MACY & JENSEN

DATED: September 19, 1996 By: /s/
RICK JENSEN

UNITED STATES ATTORNEY'S OFFICE

DATED: September 19, 1996 By: /s/
DANIEL E. BENSING

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CENTRAL GREEN COMPANY, a California Limited Partnership, Plaintiff, vs. UNITED STATES OF AMERICA, MADERA IRRIGATION DISTRICT, Defendants.	CV-F-96-5541-REC-SMS SCHEDULING CONFERENCE ORDER Expert Disclosure Deadline: 8/15/97 Supplemental Expert Disclosure Deadline: 9/12/97 Discovery Deadline: 11/7/97 Non-Dispositive Motion Filing Deadline: 11/24/97 Dispositive Motion Filing Deadline: 12/15/97 Pre-Trial Conference Date: 2/3/98, 2:00 pm, Ctrm. 4 Trial Date: 3/24/98, 10:00 am, Ctrm. 1 (JT - 7 days)

1. Date of Scheduling Conference:
September 26, 1996.
2. Appearances of Counsel:
Peter L. Simon of McCormick, Barstow, Sheppard, Wayte & Carruth appeared on behalf of plaintiff.
Assistant U.S. Attorney Daniel E. Bensing appeared on behalf of defendant, United States of America ("USA").
Rick E. Jensen of Hager, Trippel, Macy & Jensen appeared on behalf of defendant, Madera Irrigation District ("MID").
3. The Pleadings:
A. Summary of the Pleadings.

Plaintiff is a limited partnership which owns certain real property located in Madera County, California, most of which is planted to pistachios.

Defendant USA has been sued because through the Department of Interior and the Bureau of Reclamation, the USA owns the Madera Canal located in Madera County, California, used for the delivery of irrigation water which passes through Plaintiff's real property.

Defendant MID has an agreement with the USA to operate and maintain the Madera Canal.

The First Amended Complaint is styled in four claims for Inverse Condemnation, Continuing Nuisance, Continuing Trespass, and Dangerous Condition of Real Property. All of the claims arise out of damages which allegedly have been and are continuing to be incurred by plaintiff for water which is leaking out of the Madera Canal onto and under Plaintiff's property damaging pistachio trees and increasing cultural costs of the property.

Defendant USA answered the First Amended Complaint denying the material allegations thereof, and alleging affirmative defenses of failure to state a claim, lack of subject matter jurisdiction, sovereign immunity, and statute of limitations. Defendant MID answered the First Amended Complaint denying the material allegations thereof, and alleging affirmative defenses of failure to state a claim, bar of limitations, laches, Plaintiff's negligence, Plaintiff's intentional conduct, assumption of the risk, failure to mitigate damages, intervening/superseding causes, act of God/natural condition, prescriptive easement, coming to the nuisance, privilege, lack of unreasonable interference, equitable estoppel, authorized conduct, and intervening superseding cause.

Plaintiff's Contentions:

Plaintiff contends that water is leaking from the Madera Canal onto and under its property thereby constituting a trespass, nuisance, and inversely condemning its property since the escaping water has damaged the roots of its trees and

increased its cultural costs due to the problems associated with having excess water on its property which interferes with normal cultural practices. Additionally, the value of the land is diminished to the extent the trespass and/or nuisance cannot be completely abated such that defendants have inversely condemned Plaintiff's property.

Plaintiff asserts that either or both defendants are responsible for the leakage problem. Defendant USA constructed and generally has maintained the Madera Canal for some period of time. Defendant USA has entered into an agreement with defendant MID whereby MID is allowed to flow water through the canal in return for which MID must maintain the canal to prevent leakage of the type that is occurring.

While plaintiff understands that both defendants want to point the finger at each other (MID contends it is a construction problem while the USA contends it is a maintenance problem), one thing is clear that the canal leaks and it is damaging Plaintiff's property.

Defendants' Contentions:

Defendant USA contends that to the extent any water is leaking from the Madera Canal, it is defendant MID's responsibility for maintaining the canal, and that it either is directly responsible to plaintiff for any such leakage or is required to indemnify the USA to the extent such leakage occurs and is subject to the provisions of the agreement between defendants.

Defendant MID contends that if the Madera Canal is leaking onto Plaintiff's property, it is a construction defect, not the subject of its maintenance agreement with the USA and, therefore, MID is not responsible for the alleged leakage.

B. Orders Re: Amendment of Pleadings.

No amendments are proposed at this time.

C. Consent To Proceed Before U.S. Magistrate.

This case will not be assigned for all intents and purposes, including trial, to the Honorable Sandra M. Snyder, U.S. Magistrate Judge, as the parties do not so consent.

4. Factual Summary:

A. Admitted Facts which are deemed proven without further proceedings.

(1) The Madera Canal passes through portions of Plaintiff's property.

(2) Defendant USA constructed the Madera Canal through the Department of Interior, United States Bureau of Reclamation.

(3) Defendant USA entered into an agreement with defendant MID whereby MID was allowed to flow water through the Madera Canal on the terms and conditions specifically set forth in the agreement.

B. Contested Facts.

(1) Whether water has been leaking from the Madera Canal onto and under Plaintiff's property.

(2) Whether the cause of water leaking from the Madera Canal onto and under Plaintiff's property is a construction defect or a problem caused by poor maintenance.

(3) Whether sufficient water has leaked from the Madera Canal to cause damage to Plaintiff's trees.

(4) Whether sufficient water has leaked from the Madera Canal to increase Plaintiff's cultural costs and the extent of such increase.

(5) Whether the water which has leaked from the Madera Canal has inversely condemned Plaintiff's property by causing damages of the type constituting inverse condemnation.

(6) The value of Plaintiff's property.

(7) The value of Plaintiff's trees which have been damaged.

(8) The amount of cultural costs plaintiff has incurred in dealing with water which has leaked from the Madera Canal.

(9) Whether plaintiff properly complied with governmental claim statutes.

(10) Whether defendants properly denied Plaintiff's governmental claims.

(11) Whether water leaking from the Madera Canal has caused a nuisance on Plaintiff's property.

(12) Whether water leaking from the Madera Canal has caused a trespass to Plaintiff's property.

(13) Whether water leaking from the Madera Canal has created a dangerous condition of real property.

(14) Whether plaintiff failed to timely file the complaint under relevant Code of Civil Procedure §§ 337.1, 337.15, 338, and 343.

(15) Whether plaintiff was negligent relative to its operation of the subject real property and thereby caused any of its own damages.

(16) Whether plaintiff intentionally caused any of its own damages.

(17) Whether plaintiff assumed the risk of any of the damages alleged in the complaint.

(18) Whether plaintiff failed to mitigate its damages.

(19) Whether actions of plaintiff were caused by intervening or superseding causes unrelated to these defendants.

(20) Whether the injuries to plaintiff were caused by a natural condition and/or an act of God sufficient to bar any claim by way of the First Amended Complaint.

(21) Whether a prescriptive easement bars Plaintiff's claims.

(22) Whether plaintiff "came to the nuisance" thereby barring it from any relief alleged in the First Amended Complaint.

(23) Whether any of defendants' conduct was privileged.

(24) Whether defendants' conduct does not constitute an unreasonable interference with the use of Plaintiff's land.

(25) Whether plaintiff is equitably estopped from asserting the claims of the complaint.

(26) The nature and extent of Plaintiff's claimed damages.

(27) When Plaintiff's injuries occurred.

(28) Whether any actions by defendant USA which allegedly caused Plaintiff's injuries were motivated by economic and social policy factors.

5. Legal Issues:

A. Uncontested.

(1) Venue

B. Contested.

(1) Defendant USA contends that this court is not the appropriate court for litigation of Plaintiff's inverse condemnation claim, that the Court of Claims is the only appropriate court, and that Plaintiff's claims are barred by flood water immunity, discretionary function immunity, and statute of limitations.

6. Discovery Plan and Cut-Off Dates:

The parties are ordered to complete all discovery on or before November 7, 1997.

The parties are ordered to disclose all expert witnesses, in writing, on or before August 15, 1997, and all supplemental expert witnesses, in writing, on or before September 12, 1997.

Local Rule 253(b) notwithstanding, the written designation of experts shall **be made pursuant to F.R.Civ.P. Rule 26(a) (2), (A) and (B), and shall include all information required thereunder**. Failure to designate experts in compliance with this Order may result in the court excluding the testimony or other evidence offered through such experts that are not disclosed pursuant to this Order.

The provisions of Fed.R.Civ.P. 26(b) (4) shall apply to all discovery relating to experts and their opinions. Experts must

be fully prepared to be examined on all subjects and opinions included in the designation. Failure to comply will result in the imposition of sanctions.

7. Pre-Trial Motion Schedule:

All Non-Dispositive Pre-Trial Motions, including any discovery motions, are to be filed on or before November 24, 1997, and are heard on Mondays at 10:00 a.m. in Courtroom No.4 before the Honorable Sandra M. Snyder, U.S. Magistrate Judge. **Counsel must comply with Local Rule 251 with respect to discovery disputes or the motion will be dropped from calendar**.

In scheduling such motions, the Magistrate Judge may grant applications for an order shortening time pursuant to Local Rule 142(d). However, if counsel does not obtain an order shortening time, the notice of motion must comply with Local Rule 251.

All Dispositive Pre-Trial Motions are to be filed on or before December 15, 1997, and are heard on Mondays at 1:30 p.m. in Courtroom No.1 before the Honorable Robert E. Coyle, United States District Court Judge. In scheduling such motions, counsel shall comply with **Local Rule 230**.

8. Pre-Trial Conference Date:

February 3, 1998 at 2:00 p.m. in Courtroom No.4 before the Honorable Sandra M. Snyder, U.S. Magistrate Judge.

The parties are ordered to file a **JOINT Pre-Trial Statement pursuant to Local Rule 281(a) (2)**.The parties are further ordered to submit an additional copy of their Joint Pre-Trial Statement on a 3½" computer disc, formatted for **WordPerfect 6.1 for Windows**, directly to the Magistrate Judge's chambers, Third Floor, Room 3419. The computer disc will not be returned unless the parties so request and a self-addressed stamped envelope or mailing container is provided.

Counsels' attention is directed to **Rules 281 and 282 of the Local Rules** of Practice for the Eastern District of California as to the obligations of counsel in preparing for the

Pre-Trial Conference. **The court will insist upon strict compliance with those Rules**.

9. Trial Date:

March 24, 1998 at 10:00 a.m. in Courtroom No.1 before the Honorable Robert E. Coyle, United States District Court Judge.

A. This is a jury trial.

B. Counsels' Estimate of Trial Time:
7 days.

C. Counsels' attention is directed to **Rule 285 of the Local Rules** of Practice for the Eastern District of California.

10. Settlement Conference:

Should the parties desire a Settlement Conference, they will jointly request one of the court, and one will be arranged. In making such request, the parties are directed to notify the court as to whether or not they desire the undersigned to conduct the Settlement Conference or to arrange for one before another Judicial officer.

11. Request for Bifurcation, Appointment of Special Master, or other Techniques to Shorten Trial:

Not applicable at this time.

12. Related Matters Pending:

There are no pending related matters.

13. Compliance with Federal Procedure:

The court requires compliance with the Federal Rules of Civil Procedure and the Local Rules of Practice for the Eastern District of California. To aid the court in the efficient administration of this case, all counsel are directed to familiarize themselves with the Federal Rules of Civil Procedure and the Local Rules of Practice for the Eastern District of California, and to keep abreast of any amendments thereto. The court must insist upon compliance with these Rules if it is to efficiently handle its increasing caseload. Sanctions will be imposed for failure to follow the Rules as provided in both the Federal Rules of Civil Procedure and the Local Rules.

14. Effect of this Order:

The foregoing Order represents the best estimate of the court and counsel as to the agenda most suitable to bring this case to resolution. The trial date reserved is specifically reserved for this case. If the parties determine at any time that the schedule outlined in this Order cannot be met, counsel are ordered to notify the court *immediately* of that fact so that adjustments may be made, either by stipulation or by subsequent Status Conference.

Stipulations extending the deadlines contained herein will not be considered unless they are accompanied by affidavits or declarations and, where appropriate, attached exhibits which establish good cause for granting the relief requested.

FAILURE TO COMPLY WITH THIS ORDER SHALL RESULT IN THE IMPOSITION OF SANCTIONS.

DATED: Sept. 27, 1996

/s/
SANDRA M. SNYDER,
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. ROBERT E. COYLE

CENTRAL GREEN COMPANY, a California Limited Partnership, Plaintiff, vs. UNITED STATES OF AMERICA; MADERA IRRIGATION DISTRICT, Defendants.	CIV-F-96-5541 REC SMS Defendant's Motion for Judgment on the Pleadings

Fresno, California Monday, August 25, 1997

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Peggy J. Smith, Official Reporter

APPEARANCES OF COUNSEL:

For the Plaintiff:

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP
Attorneys at Law
5 River Park Place East
Fresno, CA 93720
BY: **TIMOTHY JONES**

For the Defendant:

YOSHINORI HIMEL
Assistant U.S. Attorney
555 Capitol Mall, Ste. 1550
Sacramento, CA 95814

THE CLERK: Number 27 on the calendar, Civil-F-96-5541 REC, Central Green versus United States, defendant's motion for judgment on the pleadings.

MR. JONES: Timothy Jones, McCormick, Barstow, on behalf of Central Green.

MR. HIMEL: Good day, your Honor, Yoshinori Himel, Assistant United States Attorney, representing defendant movant.

THE COURT: Mr. Jones, Mr. Himel, this is the government's motion in this matter.

Mr. Himel.

MR. HIMEL: Your Honor, I'm prepared to answer questions. I believe that the briefing covers everything that I would have said today.

THE COURT: Mr. Jones?

MR. JONES: Your Honor, it seems to me the question that needs to be addressed here is whether the term "floodwaters" means anything within the immunity provision of the Act, and as interpreted by *James*, and it seems to me that the U.S.' position is that they read that term right out of the statute and right out of the *James* court analysis.

Our position is that the *Sumner Peck* case was a very thorough analysis of exactly what is in issue and why the term "floodwaters" cannot be eliminated from the analysis, and the cases that have gone the other way have followed the *Hayes* line and then the analysis of the *Hayes* line of cases to really focus on whether or not the project itself has as one of its purposes flood control.

If they find that to be the case, that swallows up the whole test of whether or not the immunity applies, and every Ninth Circuit case, except for the *State of Washington* case, has discussed the floodwater question.

Reference is made to *McCarthy*, and as we pointed out in

McCarthy, the court said that they adjusted the level of the lake and that satisfied, from the factual standpoint, whether or not it was floodwater because it was adjusted based on incoming flows.

In the *Morici* case, which is relied on heavily by the U.S., in that case, the court said very clearly *Morici* does not argue in this court that the waters involved were anything other than floodwaters within the meaning of the statute. And so if that was not an appropriate consideration, the court, you know, would not have voted it or whatever. It would have read it out.

THE COURT: Doesn't each Columbia River Basin Irrigation District case pretty well state it can be a multi-purpose and if it's a flood project and one of the purposes is generating electricity or irrigation water, the immunity remains? It's still a flood project.

MR. JONES: You are referring to the *State of Washington versus U.S.* case, your Honor? That's a Ninth Circuit case?

THE COURT: As well as *James*. I think *James* also gives the same result and certainly the Florida case does.

MR. JONES: Well, in *James*, my recollection is *James* involved injuries that occurred in lakes or people who pass through meters, I think it was something like that, and in that case, that's where the court talks about the floodwater issue and the court says that floodwater was not an issue there because there was no dispute as to whether these waters were floodwaters, but the court gave a definition of what is floodwater. That is something that passes through the project for the purpose of or related to flood control.

And if it didn't intend some factual analysis on the issue of what the water was passing through the project for, all it had to say was any water passing through a project that has flood control as any purpose, any part of its purpose would effectively be subject to immunity, and the court didn't say that in *James*.

The court said you have to look at the water and say, one, it passed through the project; and, two, it passed through for

flood control purposes.

And that's exactly what Judge Wanger did in *Sumner Peck*. That issue was raised specifically on the motion for reconsideration. And Judge Wanger said, yes, that it was a project, the purpose had as one of its purposes flood control, but the court had to look at whether or not the water passed through for that purpose or not. It's a factual question that is related to flood control and that's what he decided the case on. It was a question of fact. And he said that they would have to go beyond the motion to dismiss stage.

It seems a bit unfair to immunize the government for any possible occurrence related downstream in an irrigation canal if they are using that water, selling it for irrigation purposes and they are not maintaining that project, if the water is being maintained and let out --

THE COURT: I don't disagree with you. It seems unfair. The question is whether or not the government is immune.

MR. JONES: First you start with the question of whether or not -- I think it's an issue of fairness. Is it an intended immunity to protect the government from this type of a circumstance? Most of the cases have been accident cases. Most of them are accident cases, and the courts note that whether or not it's a floodwater is not an issue.

How can you avoid the *McCarthy* statement that the court looked into whether or not the level of the lake was adjusted to handle incoming flows? If that's not an issue, why would the court have looked at it? If it was not important of what was floodwater, why would the *Morici* court say the parties didn't raise it?

THE COURT: If this is out through a separate channel rather than the regular channel of the river, obviously, it was released under your definition, I would think, to provide more space for floodwaters later on in the season.

MR. JONES: If you look at *McCarthy,* the way the court looked at it, the court said are they adjusting the level of the

lake to accommodate floodwater. Impliedly, that means if they are not adjusting the level of the lake to accommodate waters coming in for flood control purposes, then they are adjusting the level of the lake for some other reason.

If it's adjusted for some other reason, there is a question as to whether or not that's a floodwater. If they are adjusting the level of the lake, let's say, because rather than allowing for incoming flows of the river that might overflow the dam, if they are adjusting the level of the lake for the sole purpose of maintaining water to irrigate later in the season, that has nothing to do with protecting people from floods.

Our position is that consistent with *James*, consistent with *McCarthy* and consistent with the discussion in *Morici* and absolutely on all fours with Judge Wanger's opinion in *Sumner Peck*. The immunity either doesn't apply or it certainly creates a question of fact.

THE COURT: I guess what the Court has to decide then, is Judge Wanger right in interpreting the Ninth Circuit and I agree with his interpretation of *Columbia*, and I would rule in your favor. If I disagree with that interpretation, then I don't. I guess that's what that --

MR. JONES: We are walking along his analysis relatively carefully, your Honor, but I still think that to disagree with the interpretation, you have to read out the language in *McCarthy,* you have to read out some of the language in the definition of floodwater in *James*. And I think it really will do violence to what was intended by the Act. As broad as it might be, I think it is an overreaching.

THE COURT: Anything further on behalf of the government?

MR. HIMEL: Yes, your Honor, very briefly. Plaintiff's counsel conceded that under the test that he argues, if the sole purpose of the releases from the dam that will resulted in water going through the irrigation canal were flood control, then he would concede that the government was immune from releasing

the releases of that water.

The point that the court – that the Ninth Circuit decided and this Court has repeated in some of its decisions in the Ninth Circuit's *Morici* case was the difficulty of assigning a purpose to particular releases, and because of that factual difficulty, the plaintiff has conceded, too, that he thinks it's a factual question, and thinks it's necessary to make a factual issue.

It's the difficulty of that factual issue that caused the Ninth Circuit, as one of its reasons in *Morici*, to reach a result that is contrary and rules contrary to what the plaintiff argues for. Thank you very much, your Honor.

THE COURT: Thank you. The matter stands submitted.

(The proceedings were concluded.)

I, PEGGY J. SMITH, Official Reporter, do hereby certify the foregoing transcript as true and correct.

DATED: 12-16-97

/s/
PEGGY J. SMITH